Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

MICHAEL E. TINDALL
Plaintiff-Petitioner
v.
WAYNE COUNTY FRIEND OF THE COURT, By JOSEPH A. SCHEWE, Director of Legal Services; ALAN E. SKROK, Staff Attorney, Assistant Friend Of Court; WAYNE COUNTY SHERIFF'S DEPARTMENT, By: ROBERT FICANO, Sheriff; WAYNE COUNTY CIRCUIT COURT, FAMILY DIVISION, By: KIRSTEN FRANK KELLY, Presiding Judge; MICHAEL F.SAPALA, Chief Judge
Defendants-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court in *Tindall v. Wayne County Friend of Court, et al,* 269 F.3d 533 (6th Cir. 2001) held allegations of "bad faith prosecution" should be raised and decided in state court, rather than as an exception to *Younger* abstention in federal court, as this Court has never authorized intervention on bad faith grounds. The appellate court further found it "error" to grant summary judgment against a nonmovant that refuses to rebut a properly supported motion for summary judgment under Fed. R. Civ. P. 56(e). The questions presented are:

1. Whether "bad faith prosecution" must be raised and decided in state court, rather than asserted in federal court, as an exception to *Younger* abstention.

2. Whether summary judgment is properly entered against a non-moving party who does not rebut a properly supported summary judgment motion under Fed. R. Civ. P 56(e).

3. Whether a state court defendant can nullify a judgment against it, and, moot a pending appeal, by intentional post judgment action that expressly continues the collateral consequences caused by its own illegal conduct.

RULE 14.1(b) AND 29.6 STATEMENT

The parties in the court of appeals were Petitioner Michael E. Tindall, and Respondent representatives of the Wayne County Friend of Court and Wayne County Circuit Court, Family Division, in their respective official capacities. Defendant-Appellee Wayne County Sheriff, representative of the Wayne County Sheriff's Department, neither entered an appearance nor filed briefs in the court of appeals. None of the parties are corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Michael E. Tindall ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the District Court dated October 23, 2001 dismissing this action is unreported. (App. A,Vol I, P3.). The underlying decision of the Court of Appeals for the Sixth Circuit, dated October 15, 2001, reversing the District Court is reported at 269 F.3d 533 (6th Cir. 2001)(App.B, Vol. I, P.5). The original decision by the District Court for the Eastern District of Michigan, dated September 30, 1999, is reported at 1999 U.S. Dist. Lexis 15928 (E.D. MI 1999)(App.C, Vol I, P22.). The intervening Memorandum and Order of the District Court, dated September 28, 2001, is unreported. (App.D,Vol I, P 54). The intervening Orders entered by Respondent state court, dated January 14, 2000 (App. E, Vol I, P.78), and, March 28, 2000 (App. F, Vol. I, P 83), are unreported.

JURISDICTION

The decision of the court of appeals was entered on October 15, 2001. (App.B, Vol. I, P.5). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Although the District Court on the merits meticulously analyzed applicable Michigan statutes and court rules, (App. C, Vol. I, P.22) the decision of the Sixth Circuit Court of Appeals considered none of these.

Fed. R. Civ. P. 56(c) provides, in relevant part:

"(c) ...The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

Fed. R. Civ. P. 56(e) provides in relevant part:

"(e) ...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

STATEMENT OF THE CASE

A. Factual Background:

Petitioner, an attorney and non custodial parent divorced in Wayne County, brought an *Ex parte Young* [209 US 123(1908)] action pursuant to 28 USC 1983 challenging the delegation of judicial power and judicial decision making authority by Respondent Wayne County Circuit Court, Family Division ("WCCC") to non judicial, prosecutorial personnel of Respondent Wayne County Friend of the Court ("FOC"). Petitioner challenged this delegation of judicial power to prosecutorial persons to: issue show cause orders ("SCOs"), issue bench warrants ("BWs"), and, to suspend professional licenses, as a violation of the Fourth Amendment guarantee of due process of law, and, to a fair and impartial tribunal. Petitioner further alleged FOC violated the Fourth Amendment guarantee of due process of law by failing to comply with Michigan statutes and court rules governing the conduct of FOC hearings; and, that WCCC denied due process by customarily refusing to conduct mandatory de novo judicial hearings from FOC decisions, required under Michigan law.

B. The District Court:

Respondents moved to dismiss the Complaint, citing *Younger* abstention doctrine, among other grounds. Petitioner moved for summary judgment

based on the Verified Complaint, attached exhibits, and, supplemental affidavits and exhibits filed with the motion. Petitioner alternatively sought to consolidate trial on the merits with the preliminary injunction hearing, under Fed. R. Civ. P. 65(a)(2), to resolve any issues of fact the district court found remaining under Fed. R. Civ. P. 56(d).

At the preliminary injunction hearing, the district court heard argument on all motions. Respondent submitted no evidence, counter affidavits or exhibits in support of their response to the summary judgment motion. Despite repeated invitations from the district court to do so, Respondents refused to supplement or otherwise support their response. On September 30, 1999, the district court issued its decision granting Petitioner summary judgment as to Counts IV and V of the Complaint, and, abstaining under *Younger* from consideration of Counts III and VI.

C. Post Judgment Proceedings:

Respondents moved for Relief from Judgment under FRCP 60(b). Petitioner moved, in Respondent state court, to disqualify WCCC from conducting further proceedings in the state divorce case under *Johnson v. Mississippi, 403 US 212 (1971).* The motion to disqualify was "**granted**" on December 10, 1999. Thereafter, however, WCCC entered a secret order, without notice to either state court party, or, hearing of any kind, "**denying**" the previously granted motion and "transferring" the case to an

adjacent county chosen by WCCC. Respondent then moved, on February 1, 2000, to vacate the Judgment against it and dismiss the Complaint, with prejudice, citing post judgment mootness resulting manufactured by the secret order it entered. The district court issued its Memorandum Opinion and Order granting Respondents' motion, pending remand, on September 28, 2001.

D. The Court of Appeals Decision:

The Court of Appeals for the Sixth Circuit reversed the district court's decision of September 30, 1999, on the merits, vacated the Judgment, and, remanded with direction to dismiss Petitioner's Complaint in its entirety. The court declined to reach any of the issues presented, except *Younger* abstention, *Tindall, at 536,* ruling that while bad faith prosecution may serve as a proper exception to *Younger* abstention doctrine, this Court has never authorized federal intervention on bad faith grounds. *Id at 539.* The court held that claims of bad faith prosecution, commonly asserted as an exception to *Younger* abstention in a federal court proceeding, should, instead, be raised in state court by motion or appeal. *Id at 539-540.*

The court further ruled the district court erred in treating Respondent's failure and refusal to rebut Petitioner's properly supported motion for summary judgment as an "admission"; *Id at 539,* and, treating Respondent's "admission" as "evidence of bad faith". *Id.*

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's decision in *Tindall* destroys this Court's long established and scrupulously maintained delicate balance between Younger abstention doctrine's deference to state sovereignty; and, *Young* doctrine's preservation of the continuing viability of the Supremacy Clause under Article VI of the Constitution.

A. Younger Abstention Doctrine:

Younger v. Harris, 401 US 37 (1971) and its progeny establish the well-known and commonly accepted federal policy against federal intervention in pending state court proceedings, absent extraordinary circumstances. *Middlesex County Ethics Comm. v. Garden State Bar Ass. et al, 457 US 423 (1982).* *Younger* doctrine rests on comity and the proper respect for state functions. It rejects any presumption that state courts will not safeguard constitutional rights, and, expressly presumes that state courts are competent to interpret, recognize and enforce federal rights. Indeed, Article VI of the U.S. Constitution clearly and unambiguously declares the Constitution to be the supreme law of the land and expressly commands state court judges to enforce it, contrary provisions of state law notwithstanding.

For as long as this Court has maintained this policy of deference to paramount state interests, it

has also recognized that the essential predicate to *Younger* abstention in favor of state courts is that the state court must be a "fair and impartial" tribunal. *Hoffman v. Pursue, 420 US 592 (1975) at 594.* A state court that does not provide a meaningful opportunity to be heard is not a "fair and impartial" tribunal. *Boddie v. Conn., 401 US 371 (1971).* Even the mere appearance of the possibility that a state court may not be fair and impartial is sufficient to require remedial action to avoid the mere appearance of impropriety. *Johnson v. Mississippi, 403 US 212 (1971).* *Younger* abstention doctrine and its deference [presumption] to and in favor of state courts does not apply where the state court delegates its judicial power and decision making to non judicial, prosecutorial persons. *Girstein v. Pugh, 420 US 103 (1975) at 108, n9.*

Equally well established is the well known "bad faith prosecution" exception to *Younger* abstention. Contrary to the Sixth Circuit's holding below, this Court has, indeed, authorized intervention on grounds of bad faith prosecution. *Dombrowski v. Pfitser, 380 US 479 (1965).* This Court has defined bad faith prosecution to include exactly the pattern of discriminatory enforcement, designed to inhibit the exercise of federal rights, that Petitioner has challenged in this case. *Perez v. Ledesma, 401 US 82 (1971) at P119, n11 (Brennan J. concurring). See, also, Cameron v. Johnson, 390 US 611 (1965).* As Justice Brennan stated in *Perez,*

supra at 120:

> **"Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution is pending. Intervention in such cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means ...It simply prevents the unconstitutional use of the state's criminal law in bad faith against the federal plaintiff."**

The Sixth Circuit's ruling that allegations of bad faith prosecution should be raised and decided in state court, rather than as grounds for exception to *Younger* abstention in federal court, literally eliminates the bad faith exception to *Younger* abstention entirely. *Younger* abstention is a federal doctrine, by which a federal court stays its own hand, and, defers to a state court's pending proceeding precisely because the federal court is satisfied that the state court proceeding will provide a fair and impartial tribunal to adjudicate federal rights. Bad faith is an issue for determination by a federal court, not the state court. *Cameron v. Johnson, 390 US 611 (1968).* Allowing a state court to decide, for itself, the question of whether its own proceedings are brought in bad faith makes the state court the final arbiter of its own conduct and destroys any prospect of relief to end an ongoing violation of federal law by state court actors. Such a determination clearly rests with the federal court,

not the state court. *Idaho v. Coer'd Alene Tribe of Idaho, 521 US 261 (1997) at 287.*

B.Young Doctrine and the Supremacy Clause:

Ex parte Young doctrine balances *Younger* abstention to preserve the continuing viability of the Supremacy Clause and its command that state court judges respect and enforce federal constitutional guarantees, notwithstanding any contrary provisions of state law. The importance of having federal courts open to enforce and interpret federal rights supersedes even paramount state interests. *Idaho, supra at 293-294.* The propensity of states to erect obstacles to deter the enforcement of federal constitutional rights has been clearly recognized by this Court. *Idaho, supra, at 273-274. 1*

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1. Precisely such obstacles have been consistently applied by Michigan Courts to penalize and discourage the enforcement of federal rights and to continue the illegal procedures complained of in this case, including: (1) the appointment of a state court receiver to dismiss the federal case before it could be decided; (2) the post judgment entry of secret orders transferring the state case to moot the appeal and vacate the adverse judgment(App.E,F Vol I, PP78, 83); (3) the dismissal of a subsequent state class action raising the very same claims that the district court abstained from considering here (App.G,Vol.II,P3); and,(4) the precipitous use of state

Young doctrine and *Younger* abstention doctrine form a delicate balance between deference to state sovereignty and the enforcement of clearly predominant federal constitutional rights. *Perez, supra, at 120.* That balance is clearly dependent on a correct *federal* evaluation of allegations of bad faith prosecution, *Id.*, with the enforcement of individual constitutional guarantees grounded in due process taking priority over any alleged paramount state interests. *Alden et al v. Maine, 527 US 706 (1999) at 733 and 740 (citing Reich v. Collins, 513 US 106 (1994).*

II. The Sixth Circuit's decision in *Tindall* so far departs from this Court's established course of summary disposition practice as to call for the exercise of this Court's power of supervision.

By federal court rule and the decisions of this Court, a clear and unambiguous uniform standard for summary disposition practice in federal courts has been established. A party moving for summary judgment bears the burden of informing the court of the basis for the motion and demonstrating: (1) the absence of any genuine issue of material fact; or, (2) the absence of evidence supporting the non moving party's position. *Celotex Corp. v. Cotrett, 477 US 317 (1986) at 323 and 325; Fed. R. Civ. P. 56(c).* The burden then shifts to the non-moving party to go

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pleading sanctions to penalize and discourage further challenges to the unconstitutional conduct of Michigan courts. (App.H, Vol. III, P3.)

beyond the pleadings and present affirmative evidence, exhibits, or affidavits designating specific facts showing a genuine issue of material fact for trial. *Id at 324; Matsushita Elec. Ind. Co. v. Zenith Rad. Corp., 475 US 574 (1986) at 586.* The non-moving party must rebut the moving party's contention of an absence of evidence supporting the non-moving party's position. Summary judgment is appropriate against a non-moving party that fails to rebut the moving party's position. *Fed. R. Civ. P. 56(e); Celotex, supra, at 322; Matsushita at 586.*

The Sixth Circuit's misapplication of this clearly established standard on the crucial federal issue of bad faith prosecution for purposes of *Younger* abstention clearly calls for the exercise of this Court's supervisory power over subordinate federal courts. By altering the well-established summary judgment practice on this bad faith issue, the court of appeals tipped the delicate balance between *Young* and *Younger* doctrines in a way that completely negates the VI Amendment mandate of the Supremacy clause.

The district court did exactly what *Younger* doctrine required it to do; make a *federal* determination as to bad faith to determine the existence of an exception to *Younger* abstention. As the district court repeatedly stated in both its original and its subsequent intervening opinions, Petitioner supplemented its Verified Complaint and motion with extensive exhibits and affidavits. App.C,

D, Vol I, PP 22 and 54. Respondents, despite numerous opportunities and invitations from the district court to do so, failed to rebut any of the evidence Petitioner submitted. Indeed, in its intervening opinion, the district court expressly found that even Respondent's belatedly submitted affidavit *supported* Petitioner's claims that no circuit judge independently reviews SCOs and BWs prior to issuance by FOC prosecutorial personnel.

The district court did not, as the court of appeals opinion postured, take Respondents' failure to rebut as an "admission"; and, it did not use or rely on that "admission" as evidence of bad faith. *Tindall at 539.* The district court addressed the only evidence before it, Petitioner's evidence, and made the required *federal* determination that bad faith had been shown. *Cameron v. Johnson, 390 US 611 (1965).* Later, the district court confirmed that even Respondents' proffered post judgment evidence supported this conclusion. The Sixth Circuit's, misapplication of established summary judgment standards of practice directly compromises the delicate balance between *Young* and *Younger* doctrines, and, completely guts the bad faith exception to *Younger* established and consistently maintained by this Court.

III. Allowing a state court defendant to moot a pending appeal and vacate an adverse judgment by illegal, post judgment conduct, that expressly preserves the collateral consequences it illegally created, eviscerates the Supremacy Clause of

Article VI of the Constitution.

One need only view the post judgment conduct of Respondent WCCC to conclude that the *Younger* predicate of a "fair and impartial" state tribunal did not exist. Following the entry of an adverse judgment, WCCC "**granted**" Petitioner's state court motion to disqualify itself under *Johnson v. Mississippi, supra.* WCCC then refused to enter an order confirming its own ruling. Instead, it entered a secret order, without notice to either state court party and without hearing, "**denying**" the motion it had previously "**granted**", and, administratively transferring the state case to an adjoining county of its own choosing. 2 WCCC did not give notice to the state court parties of the modification or entry of this order, and, did not serve a copy of it on either state court party. Rather, it used the secret order as the basis for its Motion to Vacate the adverse judgment on grounds of post judgment mootness.

The secret order entered by WCCC to transfer the state case expressly preserved, by its terms, the collateral consequences of receivership, sanctions, and, illegal account adjustments flowing directly

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2. *Michigan administrative rules of procedure require the State Court Administrator's Office ("SCAO") to select the new county of transfer, and, expressly forbid any contact between the transferor judge and the new judge or county, or, even the suggestion of a transferee county by the transferor judge.*

from Respondent's unconstitutional conduct. App.E, Vol I, PP 78-82. While these collateral consequences remain outstanding, the case and its appeal cannot become moot. *Powell v. McCormis, 395 US 486 (1969) at 499-500; Oshea v. Littleton, 414 US 488 (1974).*

This Court has recognized the propensity of state government defendants to act to moot the issues of a case to avoid appellate review of their own illegal conduct. *County of Los Angeles et al v. Davis et al, 440 US 625 (1979).* Those issues cannot be mooted until all collateral effects of the illegal conduct have been completely and irrevocable eradicated. *Id at 631.* The burden of demonstrating this complete and irrevocable eradication fell squarely on Respondents. *Spencer v. Kemna, 523 US 1 (1998).*

By its own secretly entered order, WCCC preserved the collateral consequences of its own illegal actions. The effort to moot the issues of this case, post judgment, failed.

Conclusion:

The Sixth Circuit Court of Appeals in this case has turned both *Younger* abstention and *Ex parte Young* doctrine on their literal ear. By consigning to the state court the issue of bad faith prosecution, the Sixth Circuit has effectively eliminated the bad faith exception to *Younger* abstention; and, deprived individual litigants of any

effective means to challenge the unconstitutional conduct of state court actors, or, enforce their due process guarantee of a fair and impartial state tribunal so carefully preserved by *Young* and its progeny. This Court should, therefore, grant this petition to restore the delicate balance it has so carefully created and maintained.

Respectfully submitted,

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